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No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE TURAJLICH AND CHARLES KAMPAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15) is reported at 277 F. 2d 805.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1960 (Pet. App. 16, 17). A petition for rehearing was denied on June 1, 1960 (Pet. App. 18). The petition for a writ of certiorari was filed on June 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial where the court, after permitting a co-defendant to

plead guilty during the trial, allowed the trial to proceed against petitioners under proper cautionary instructions regarding the guilty plea.

2. Whether the court erred in giving a supplementary charge which covered two questions asked by the jury regarding the conspiracy count.

RULES INVOLVED

Rules 14, 24, and 30 of the Federal Rules of Criminal Procedure provide in pertinent part:

> Rule 14. *Relief from Prejudicial Joinder.*
>
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> Rule 24. *Trial Jurors.*
>
> * * * * *
>
> (b) PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.
>
> * * * * *

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioner Turaglich, together with Riley and Randall, were charged in an indictment (No. 15,649) returned in the United States District Court for the Western District of Pennsylvania with violations of the federal bank robbery statute, 18 U.S.C. 2113. The three counts respectively were for entering with intent to commit a felony, robbing the loan association, and jeopardizing the lives of association employees by threatening them with a pistol (R. 1a, 2b).[1] In a later indictment (No. 15,689) petitioners Turaglich and Kampas, together with Riley, Randall and Cree-

[1] "R." refers to the printed record consisting of appellant's appendix from 1a-7b and appellee's appendix from 1b-35b.

don, were charged with similar offenses in the first three counts and in the fourth count with a conspiracy to commit the robbery (R. 1a, 25b). The four overt acts alleged (1) that Turajlich, Randall, and Riley met to plan the robbery; (2) that Turajlich and Creedon advised Randall and Riley, the robbers, that police officer Creedon had agreed to help them in making an escape (R. 33b); (3) that Turajlich supplied Riley and Randall with loaded guns and disguises; and (4) that Kampas drove one of the getaway cars (R. 19b). The two cases were later consolidated (R. 3a, 12a). The jury found petitioners Turajlich and Kampas guilty on all counts remaining after the court had dismissed count 1 of each indictment (R. 5a, 6a, 14a). Turajlich was given a fifteen-year sentence and a $500 fine on count 3 in No. 15,649 to run concurrently with a five-year sentence on the conspiracy count (R. 71a–73a). Kampas was given a nine-year sentence on count 3 in No. 15,689 to run concurrently with a five-year sentence on the conspiracy count (R. 74a–75a). On appeal, the convictions were affirmed (Pet. App. 15–17).

1. Randall and Riley, who engaged in the actual robbery, pleaded guilty on the morning of October 5, 1959, the date when the trial began, and testified for the government (Tr. 21–22, 33–35, 57).[3] Randall's testimony incriminated Turajlich (Tr. 23, 27, 28, 36, 40) and Riley's incriminated Turajlich, Creedon, and Kampas (Tr. 60–61, 66–70, 73–83).

At the noon recess on October 6, 1959, Creedon withdrew his plea of not guilty to the conspiracy

[3] "Tr." refers to the transcript of the trial testimony.

charge in count 4 and pleaded guilty (R. 6a).[1] At that time the court charged the jury (Tr. 105-106):

> * * * in your absence, the defendant Charles F. Creedon, who was charged in one of the indictments with conspiracy, has pleaded guilty to conspiracy. The Court accepted his plea after taking proper precautions so he is no longer a defendant in this case. He is no longer sitting at counsel table with his lawyer. The matter affecting Creedon will be disposed of by the Court at some other time and place. The fact that Creedon pleaded guilty should not affect the defendants Charles Kampas or George Turajlich in your minds in any degree. Those two defendants who you now see at the counsel table are surrounded by the presumption of innocence which presumption stays with them until the prosecution proves them guilty beyond a reasonable doubt of the crime they are charged with. So the fact one Creedon has pleaded guilty should not affect your judgment as to the remaining two defendants. * * *

Petitioner's counsel then asked for a mistrial by reason of the court's acceptance of Creedon's plea on the ground that his changed plea surprised and prejudiced them, and left them saddled with a jury which Creedon's lawyer had a hand in choosing. The motion was denied but a continuance was granted until the next morning (R. 18a–36a).

In its final instruction the court reminded the jury that they were trying the cases only against petitioners Turajlich and Kampas, and that they were not to

[1] The other three counts against Creedon were dismissed on October 8, 1959 (R. 5a).

be concerned with the charges against the other three who had pleaded guilty. The court continued (R. 12b):

> You are only to decide and pass upon the guilt or innocence of George Turajlich and Charles Kampas. As I have already told you, the fact that Riley and Randall have pleaded guilty to robbery and conspiracy, and that Creedon has pleaded guilty to conspiracy, should have no effect whatsoever on your consideration of the guilt or innocence of Turajlich and Kampas. The guilty pleas of Riley, Randall and Creedon are not evidence against Kampas and Turajlich, and not to be considered by you in determining the guilt or innocence of either. You decide their cases on the evidence you have heard in this court from the witness stand and from the exhibits.

2. After the jurors had been deliberating for a time they returned to the courtroom with two questions as follows (R. 30b):

> THE COURT:
>
> You have submitted two questions.
>
> In Re: Defendant, Charles Kampas
>
> Can we the jury find the defendant guilty solely of overt act No. 4 and not find him guilty of the fourth count of No. 15689.
>
> In Re: George Turajlich, Defendant
>
> Can we find this defendant guilty of fourth count—overt acts 1 and 2 and not find him guilty of overt act 3.

The court instructed the jury, in part as follows (R. 31b):

> The short answer, ladies and gentlemen, is, you do not find them guilty of any overt act.

> You find them guilty or not guilty of conspiracy, which is the fourth count.
>
> The fourth count includes overt acts 1, 2, 3 and 4. You don't find him guilty—either of them guilty or not guilty of any overt act. You find them either guilty or not guilty of conspiracy, which is the fourth count.

The court pointed out, however, that it had previously instructed the jury that there was insufficient evidence to prove the first two overt acts (see R. 19b). The court further explained why it had considered these two overt acts as not proved and again instructed the jury not to consider them (R. 33b-34b).

ARGUMENT

1. Petitioners contend that by allowing Creedon to plead guilty to the conspiracy charge and refusing to grant a severance at that stage of the proceedings the court denied them a fair trial. This is said to result from the probability that the jurors would also find petitioners guilty on the basis of Creedon's plea, and from an alleged dilution of their right to peremptory challenges by being left handicapped with a jury which Creedon's counsel assisted in picking before bowing out of the case (Pet. 7-13). The argument is without substance.

a. The record shows that Creedon's action did not come as a complete surprise to the petitioners (R. 21a), although it did to the government (R. 23a, 30a). Moreover, the court granted petitioners a continuance until the next day. There was therefore no reason for the court not to accept Creedon's plea when he chose to make it.

The trial court amply protected the remaining defendants by its explicit cautionary instructions, both at the time of the acceptance of Creedon's guilty plea (Tr. 105–106) and in the final charge (R. 125), that the guilty plea should have no effect upon the jury's consideration of the guilt or innocence of petitioners Turajlich and Kampas.[4] *Nemec* v. *United States*, 178 F. 2d 656, 661 (C.A. 9), certiorari denied, 339 U.S. 985; *United States* v. *Hartenfeld*, 113 F. 2d 359, 362 (C.A. 7), certiorari denied, 311 U.S. 647; *Hines* v. *United States*, 131 F. 2d 971, 974 (C.A. 10). These instructions were particularly easy for the jury to apply here since Creedon's part in the conspiracy as a police officer was different from that of petitioners and the judge charged the jury that overt act 2 of the conspiracy count, which named Creedon, had not been proved (see the Statement, *supra*, pp. 4, 7). It must be presumed that the jury followed these explicit instructions. *Dell' Paolo* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

b. Petitioners were not deprived of their right to peremptory challenges under Rule 24(b), F. R. Crim. P. (*supra*, p. 2). The defendants, having been given the ten peremptory challenges to which they were jointly entitled under the Rule, have no ground

[4] These correct instructions are in marked contrast with those held erroneous in *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3), and *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2), where the trial courts gave the respective juries too much latitude for speculation upon the effect of the pleas of guilty by the codefendants.

for complaint that some of the defendants later decided for reasons of their own to plead guilty. *United States* v. *Macke*, 159 F. 2d 673 (C.A. 2), certiorari denied, 331 U.S. 810. Moreover, the defendants here were given by the court three additional challenges which they had requested (R. 30a; transcript of the argument on motion for a new trial, p. 22).

The substance of petitioners' argument on the motion for a new trial was that the acceptance of Creedon's guilty plea left petitioners with a prejudiced jury since Creedon's attorney had a hand in the selection of three Irish jurors; that Irish jurors, because of being Catholic and knowing of confession, would believe that the Irish government witness, Riley was telling the truth, but would tend not to believe petitioners Turajlich and Kampas, who were of Slavic descent and might be Communists (transcript of the argument on motion for a new trial, pp. 11–14). These speculative generalities are so insubstantial that petitioners' present counsel does not repeat them explicitly, but is content with asserting (Pet. 12) that this jury question raises a "delicately suggested prejudice."

2. Petitioners claim (Pet. 13) that the trial court erred in the supplemental charge given in response to two questions asked by the jury during its deliberations. This issue, however, relates only to the conspiracy count on which the sentence runs concurrently with the sentence on the substantive count. Therefore, even if petitioners' contentions were correct,

their convictions on the other counts would still suffice to sustain the judgment. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641, 642, note 1.

In any event petitioners' contentions are without merit. First, unlike *Villippou* v. *Albion Vein Slate Co.*, 250 U.S. 76, where the court gave a supplementary instruction requested by the jury in the absence of the parties without affording them an opportunity either to be present or to make timely objection, here the supplementary charge was given to the jury with petitioners' counsel present (R. 30b). Counsel certainly could have objected to this instruction or asked for clarification if he had deemed that necessary. It was not required that the court affirmatively ask counsel if he wanted to object. Since petitioners failed to object, they cannot now claim that the instruction was erroneous. See Rule 30, F. R. Crim. P. (*supra*, p. 3).

Second, the court's instructions were correct. The jury was apparently confused as to whether it was necessary to find petitioners guilty as to certain overt acts. The court clarified this confusion by explaining that the jury's sole finding should be whether or not petitioners were guilty of conspiracy; and that they need not make findings as to guilt or innocence of particular overt acts. The court did not retreat from its position in the original charge that the jury should not consider overt acts 1 and 2. The review in the supplementary charge of the insufficient evidence as to overt acts 1 and 2 was not harmful, but made clear

the particular overt acts which the court admonished the jury not to consider (R. 33b-34b).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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